FILED

97 • 492 SEP - 3 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

JOHN F. VICKERS MASONRY, an Arizona corporation,

Petitioner,

vs.

GIUSEPPE FURRER, S.P.A., an Italian corporation,

Respondent.

On Petition for a Writ of Certiorari to the State Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

CRAIG L. KELLER
Counsel of Record
KELLER & HICKEY
A Professional Corporation
Attorneys for Petitioner
One Windsor Professional Building
2627 North Third Street
Phoenix, Arizona 85004-1188
(602) 266-2110

71938

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

55 pp

QUESTION PRESENTED

Is relief to be granted to a civil litigant denied its fundamental due process right to a fair trial where the Arizona State Supreme Court has, contrary to law, substituted its factual determinations for those made by the trial court.

PARTIES TO THE PROCEEDING

The Petitioner is John F. Vickers Masonry, a/k/a Vickers/ Hari Contracting, Inc., an Arizona corporation. John F. Vickers Masonry, an Arizona corporation, had its name properly changed to Vickers/Hari Contracting, Inc. in May, 1991.

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioner states that there are no parent companies or nonwholly owned subsidiaries of Petitioner.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
A. Introduction	2
B. Factual Background	2
C. The Trial Court Decision	5
D. The Court of Appeals Decision	7
E. The Arizona State Supreme Court Decision	7
Reasons for Granting the Writ	9
I. The Petition Should Be Granted Because Petitioner Was Denied Its Fundamental Due Process Right To A Fair Trial. The Decision Below Is Contrary To This Court's Requirement Of Deference To The Original Fact Finder.	9

Contents

Page

A. The Due Process Clause Entitles Petitioner To A Fair Consideration Of Its Case Based Upon The Applicable Standards Of Review. 9

1. The Arizona State Supreme Court Mistakenly Believed That The Trial Court Erred As A Matter Of Law In Concluding That The Original Contract Price Was Binding Notwithstanding Contract Modification. 12

2. The Trial Court's Finding That The Settlement Agreement Extinguished The Claim For The Alleged Unpaid Balance Was Not Clearly Erroneous. The Arizona State Supreme Court's Decision To The Contrary Was Wrong. 13

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) 10, 11

Board of Regents v. Phoenix Newspapers, 167 Ariz. 254, 806 P.2d 348 (Ariz. 1991) 10

Contents

	Page
Federoff v. Pioneer Title & Trust Co., 166 Ariz. 383, 803 P.2d 104 (1990)	7
In re Murchinson, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955)	9
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982)	11
Milberger v. Chaney Bldg. Co., 146 Ariz. 181, 704 P.2d 822 (App. 1985)	7
United States v. Oregon State Medical Society, 343 U.S. 326, 72 S. Ct. 690, 96 L.E. 978 (1952)	10
United States v. Super. Court in & for Maricopa Cty., 144 Ariz. 265, 697 P.2d 658 (Ariz. 1985)	9
United States v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948)	11
United States v. Yellow Cab Co., 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949)	11
Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)	11
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)	11

Contents

Page

Statutes Cited:

28 U.S.C. § 1257 1

A.R.S. § 12-341.01 7

United States Constitution Cited:

Fifth Amendment 1

Fourteenth Amendment 2

Rules Cited:

Federal Rules of Civil Procedure:

Rule 52(a) 10, 11

Arizona State Rules of Civil Procedure:

Rule 12(b) 5

Rule 52(a) 10

Rules of the Supreme Court of the United States:

Rule 29.6 ii

Contents

Page

APPENDIX

Appendix A — Memorandum Decision Of The Supreme Court Of Arizona, En Banc Filed May 6, 1997 .... 1a

Appendix B — Memorandum Decision Of The Court Of Appeals Of The State Of Arizona, Division One Filed February 13, 1996 ..... 6a

Appendix C — Findings Of Fact And Conclusions Of Law Made By The Superior Court Of The State Of Arizona In And For The County Of Maricopa Dated March 18, 1993 ..... 15a

Appendix D — Judgment Of The Superior Court Of The State Of Arizona In And For The County Of Maricopa Dated March 18, 1993 ..... 26a

Appendix E — Order From The Supreme Court Of The State Of Arizona Denying Appellee's Motion For Reconsideration Filed June 5, 1997 ..... 28a

Petitioner, John F. Vickers Masonry, a/k/a Vickers/Hari Contracting, Inc., respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of Arizona in this case.

OPINIONS BELOW

The judgment (App. D) and the findings of fact and conclusions of law of the Superior Court of Arizona in and for the County of Maricopa were filed on March 18, 1993 (App. C), and are unreported. The opinion of the Arizona Court of Appeals in the form of a memorandum decision was filed on February 13, 1996 (App. B), and is unreported. The opinion of the Arizona State Supreme Court in the form of a memorandum decision was filed on May 6, 1997, and is unreported (App. A). The Arizona State Supreme Court denied Petitioner's timely Motion for Reconsideration on June 5, 1997 (App. E).

STATEMENT OF JURISDICTION

The opinion of the Arizona State Supreme Court of which Petitioner seeks review was filed on May 6, 1997. The Arizona State Supreme Court denied Petitioner's timely Motion for Reconsideration on June 5, 1997. This petition is timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Introduction

The fundamental question in this case is whether a litigant has been deprived of due process when the Arizona State Supreme Court ignores its time honored standard of review wholly disregarding the lower court findings and substituting its interpretation of the facts for the factual determinations made by the trial court. This question arises in the context of the Arizona State Supreme Court disregarding the findings of fact by the trial court and affirmed by the Arizona Court of Appeals. The Arizona State Supreme Court refused to either hear oral argument or reconsider its decision wherein that court overturned the decision of the Court of Appeals. The Arizona State Supreme Court concluded that both the trial court and the Court of Appeals had misconstrued the facts of the case. The Arizona State Supreme Court essentially substituted its judgment for that of the lower courts. To fully appreciate the significance of the question presented by this case, this Court must first consider the factual background.

B. Factual Background

This matter arises out of an agreement in which Petitioner agreed to purchase from Respondent certain granite, marble and other stone material for the exterior and interior of the Esplanade Office project in Phoenix, Arizona.

Petitioner is primarily a mason subcontractor dealing in brick, block, stone and other masonry products. Petitioner entered into a fixed-price contract with the project's general contractor which included, among other things, the installation of stone, block work, steel framing and caulking. Petitioner obtained a price quote of $461,131.52 from Respondent for the stone materials to be used on the project. All of the edgework and stone materials as more fully described in the detailed request for bid were to be provided by Respondent for a specific lump sum price. Petitioner used Respondent's bid of $461,131.52 in submitting its bid to the general contractor in order to obtain the subcontract for the stonework on the project.

Through negotiation the parties reached an agreement. The parties' contract consisted of a purchase order approved by Respondent with a promise to strictly follow all contract requirements. Respondent developed a delivery schedule. One container of stone was to be delivered to the project site each week beginning in May, 1989. A total delivery of 15 to 16 containers was to be made. Respondent provided the delivery schedule to Petitioner. The delivery schedule was acceptable to Petitioner.

All elements of the parties' lump sum agreement were agreed to, including total quantity of stone material, finishing and edgework to be done, a delivery schedule, and a lump sum price with payment due dates. Based upon this lump sum agreement, Respondent delivered some 18 containers of stone, and Petitioner paid Respondent $447,366.06 in nine payments between June, 1989, and February, 1990.

No request was ever made by Respondent for Petitioner to execute any documents changing the parties' lump sum agreement. Prior to its suit, Respondent never requested payment

for any amount other than the lump sum agreement amount[1]. In reviewing the invoice for the sixteenth container, Petitioner discovered that payment of the invoice for the container would result in payment exceeding the agreed-upon total lump sum contract price.

The parties' lump sum agreement was not based upon unit prices for the stone. Stone materials were furnished by Respondent to Petitioner between May, 1989, and May, 1990. Unit prices were never discussed in the bidding, negotiation or formation of the parties' agreement. The first time that any reference to unit prices was made to Petitioner was in the invoice submitted with the first container.

From delivery of the first container in May, 1989, Petitioner received stone which was miscut and which was inconsistent with the requirements set forth in the lump sum agreement. At various times, Petitioner brought the fabrication errors and material shortages to Respondent's attention. As a result of a multitude of material discrepancies, miscuts and extra costs incurred by Petitioner in correcting Respondent's misfabrication errors, as well as late deliveries, a settlement agreement was reached between Petitioner and Respondent to resolve all performance issues.

On February 1, 1990, Respondent proposed that all of the issues concerning nonconforming material, late deliveries, and contract requirements be resolved. As part of the settlement agreement, a seventeenth container was to be shipped via air freight with 50% of the costs to be paid by Respondent and

---

1. Each container Respondent delivered had an invoice identifying contents and specifying unit prices for the contents. At no time did the parties ever agree upon unit prices. Petitioner disregarded the unit prices set forth in the invoices as simply part of Respondent's internal record keeping procedures.

50% of the costs to be paid by Petitioner. In addition, both parties waived any claim for every pending item, including any charges for extras over and above the parties' lump sum contract price.

C. The Trial Court Decision

Respondent sued Petitioner alleging that Petitioner owed $105,000 as the balance due for marble and granite materials shipped by Respondent. Respondent's Complaint sought recovery against Petitioner on a breach of contract theory.

Petitioner moved to dismiss Respondent's Complaint pursuant to 16 A.R.S. Civ. Proc., Rule 12(b), on the basis that Respondent as an Italian corporation could not maintain suit in Arizona and that Respondent had failed to join a foreign party indispensable to the action. Following denial of the Motion to Dismiss, Respondent filed its Answer.

Petitioner propounded its First Set of Requests for Admissions to Respondent. Respondent failed to timely respond to Petitioner's Requests for Admissions. Based in part on Respondent's failure to respond to the Requests for Admissions, Petitioner filed a Motion For Summary Judgment. Petitioner asserted in its Motion For Summary Judgment that it had made nine payments to Respondent totaling $447,366.06. Further, Petitioner alleged that its payments exceeded the contract price by $5,861.06.

Respondent sought leave to amend its Complaint. The amendment to the Complaint was sought to avoid an otherwise unavoidable entry of judgment on Petitioner's well-founded Motion For Summary Judgment.

Respondent was granted leave to file its First Amended Complaint seeking recovery on an open account theory.

Petitioner's Motion For Summary Judgment was denied. Thereafter, Petitioner applied for attorneys' fees. Petitioner's application was made pursuant to the trial court's Minute Entry of August 13, 1992, finding that Respondent had unreasonably delayed the proceedings by failing to respond to discovery. After hearing, the trial court ordered Respondent to pay $9,000 to Petitioner for unreasonably delaying and extending this litigation.

Petitioner filed its Answer to Respondent's First Amended Complaint and a Counterclaim against Respondent seeking unspecified damages for Respondent's breach of the agreement to supply stone materials for the project. Respondent filed its Answer to Petitioner's Counterclaim on August 10, 1992, denying that Respondent owed any sums to Petitioner.

The case was tried to the court between December 8, 1992, and January 19, 1993. Following the bench trial, the trial court concluded that on November 26, 1988, Petitioner and Respondent had entered into a fixed price or lump sum agreement. App. C. The trial court further concluded that Petitioner and Respondent completed a partial settlement pursuant to which both parties waived any rights to recover sums in excess of the fixed price or any damages for material shortages and misfabrications. App. C. The trial court adopted Petitioner's proposed findings and conclusions. App. C.

Prior to the entry of Judgment, Respondent filed a Motion For New Trial which the trial court deemed to be premature. The trial court approved and settled formal written Judgment on March 18, 1993. App. D. Thereafter, Respondent filed a Renewed Motion For New Trial. The Motion For New Trial and the Renewed Motion For New Trial were both denied. Respondent filed its Notice of Appeal on July 28, 1993.

D. The Court of Appeals Decision

On December 12, 1995, the Court of Appeals heard oral argument. On February 13, 1996, the Court of Appeals issued its Memorandum Decision affirming the trial court's Judgment. App. B. The Court of Appeals awarded Petitioner costs and reasonable attorneys' fees for the appeal pursuant to A.R.S. § 12-341.01. App. B.

The Court of Appeals acknowledged that the record contained ample support for the trial court's conclusion that the parties' contract was a fixed-price contract. App. B. The Court of Appeals also found that the record supported the trial court's conclusion that the parties' settlement agreement governed any conflicts in the performance of the contract, that the record provided ample support for the trial court's findings as to the issues the settlement agreement resolved, that the parties' settlement agreement precluded recovery for unjust enrichment, that the trial court acted well within its discretion in awarding attorneys' fees for Respondent's behavior which the Court of Appeals indicated pointlessly prolonged the litigation, and that the trial court independently reached the findings of fact and conclusions of law entered in the action. App. B. In so doing, the Court of Appeals confirmed that when reviewing the findings of a trial court, the Court of Appeals gives great deference to the trial court's findings of fact. *Milberger v. Chaney Bldg. Co.*, 146 Ariz. 181, 704 P.2d 822 (App. 1985). The Court of Appeals also confirmed that it will not disturb the trial court's factual findings unless clearly erroneous. *Federoff v. Pioneer Title & Trust Co.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990).

E. The Arizona State Supreme Court Decision

On March 26, 1996, Respondent filed a Petition for Review in the Arizona State Supreme Court. Petitioner filed its Response

to Petition for Review on April 30, 1996. The Arizona State Supreme Court filed its Memorandum Decision on May 6, 1997.

The Arizona State Supreme Court concluded that neither the trial court nor the Court of Appeals addressed the legal effect of contract modification. App. A. The Arizona State Supreme Court also determined that the trial court's findings that the settlement agreement extinguished the claim for the alleged unpaid balance were clearly erroneous. App. A. The Arizona State Supreme Court went on to conclude that "... it was erroneous to characterize a dispute that did not yet exist as a 'pending item' within the meaning of the parties' agreement." App. A.

On May 21, 1997, Petitioner filed with the Arizona State Supreme Court a Motion for Reconsideration. Petitioner argued that the Arizona State Supreme Court created an error of law by interjecting its judgment for that of the lower courts on the factual determinations concerning contract modification and the settlement agreement. Petitioner further argued that the Arizona State Supreme Court had misconstrued the facts of the case and then concluded that an error of law must have been committed by both the trial court and the Court of Appeals. Petitioner requested that the Arizona State Supreme Court affirm the decision by the Court of Appeals or, at minimum, set oral argument in this matter for a more complete and studied analysis of the case.

On June 5, 1997, without oral argument, the Arizona State Supreme Court filed its order denying Petitioner's Motion for Reconsideration. App. E.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE PETITIONER WAS DENIED ITS FUNDAMENTAL DUE PROCESS RIGHT TO A FAIR TRIAL. THE DECISION BELOW IS CONTRARY TO THIS COURT'S REQUIREMENT OF DEFERENCE TO THE ORIGINAL FACT FINDER.

The petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior rulings on a litigant's fundamental due process right to a fair trial.

A. The Due Process Clause Entitles Petitioner To A Fair Consideration Of Its Case Based Upon The Applicable Standards Of Review.

By overturning the trial court and Court of Appeals decisions, the Arizona State Supreme Court has violated Petitioner's due process right by substituting its judgment for that of the original fact finder. It is not the province of the Arizona State Supreme Court to substitute its decision for that of the trial judge who labored over two weeks in trial, considered the evidence, and determined the credibility of the witnesses in rendering a decision.

The touchstone of due process under the Arizona and federal constitutions is fundamental fairness. Due process requires that a party be given a "fair trial in a fair tribunal." *United States v. Super. Court in & for Maricopa Cty.*, 144 Ariz. 265, 697 P.2d 658 (Ariz. 1985), citing *In re Murchinson*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). To permit the Arizona

State Supreme Court to substitute its interpretation of the facts for the factual determinations made by the trial court would be fundamentally unfair and thus a deprivation of due process. This precious due process right is denigrated when an opinion resting upon a reviewing court's abuse of discretion is allowed to stand.

In reviewing findings of fact and conclusions of law, the Arizona State Supreme Court must recognize a trial court's findings of fact unless such findings are clearly erroneous. 16 A.R.S. Rules of Civ. Proc., Rule 52(a). This Rule is substantially the same as Rule 52(a), Federal Rules of Civil Procedure. The Arizona State Supreme Court is bound by the trial court's findings of fact unless clearly erroneous, giving due regard to the trial court's opportunity to review evidence and weigh the credibility of witnesses. *Board of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 806 P.2d 348 (Ariz. 1991).

In the context of this Court's review of decisions of the Federal Courts of Appeals, this Court outlined the nature and rationale underlying this limited standard of review in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). There, this Court explained that "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* at 574-575; *see also United States v. Oregon State Medical Society*, 343 U.S. 326, 339, 72 S. Ct. 690, 96 L.E. 978 (1952) ("Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded.").

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The

reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower courts. *Anderson, supra*, at 573.

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. *Anderson, supra*, at 573, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L. Ed. 2d 129 (1969).

If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Anderson, supra*, at 573-574; *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S. Ct. 177, 179, 94 L. Ed. 150 (1949); *see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982).

When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. *Anderson, supra*, at 575; *see also Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

A finding is clearly erroneous when although there is evidence to support it, the reviewing court, on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948).

Clearly, the due process requirement of a fair trial is missing here. The Arizona State Supreme Court has departed from its own and the mainstream of this Court's decisions concerning fair proceedings by engaging in a review of the case which exceeded the purview of that court. Petitioner submits that the Arizona State Supreme Court oversimplified the case through its review of the limited material presented on appeal. Then the court turned on its head the findings of fact and conclusions of law made by the trial court whose decision was made with the benefit of direct consideration of several weeks of testimony and evidence. If the Arizona State Supreme Court is not held to the applicable standard of review, then litigants in Arizona cannot receive due process. Moreover, *de novo* review by state courts of last resort deprives litigants of due process.

1. The Arizona State Supreme Court Mistakenly Believed That The Trial Court Erred As A Matter Of Law In Concluding That The Original Contract Price Was Binding Notwithstanding Contract Modification.

The Arizona State Supreme Court concluded that neither the trial court nor the Court of Appeals addressed the legal effect of contract modification. A review of the decisions by the lower courts clearly shows that the Arizona State Supreme Court's conclusion is without merit, and has resulted in the deprivation of due process for Petitioner.

The trial court concluded that the contract was a fixed-priced contract, and ordered Petitioner to pay the contract price, rather than the invoiced amounts. The Court of Appeals concluded that the record contained ample support for this factual determination, and asserted that it would not overturn this decision. The Court of Appeals stated that "[T]he invoices sent to Vickers [Petitioner] with the stone totalled more than $80,000 above the amount in the bid and the purchase order." In other

words, the Court of Appeals considered the impact of the contract modification and acknowledged that Respondent had submitted invoices for more than the original contract amount.

Following consideration of the trial's court's decision, the Court of Appeals determined that the trial court did not err in concluding that the contract remained a fixed-price contract. Respondent was entitled to the agreed upon contract amount and some "extras" as awarded by the trial court. Respondent was not entitled to the amount invoiced. There was no agreement on unit prices, and the parties agreed to be bound by their original lump sum contract after consideration of a multitude of material discrepancies, miscuts and extra costs incurred by Petitioner in correcting Respondent's misfabrication errors. Through consideration of the testimony and the evidence presented, the trial court concluded that Respondent was not entitled to the invoice amounts because the parties had never agreed to such amounts. The Arizona State Supreme Court's finding to the contrary is error.

2. The Trial Court's Finding That The Settlement Agreement Extinguished The Claim For The Alleged Unpaid Balance Was Not Clearly Erroneous. The Arizona State Supreme Court's Decision To The Contrary Was Wrong.

Here again the Arizona State Supreme Court refused to defer to the original fact-finder even though the trial court's findings were amply supported by the evidence presented at trial.

The trial court expressly found that the parties reached an agreement constituting a settlement on known, disputed items. The findings and conclusions made by the trial court are supported by the testimony and evidence presented at trial. Unlike the trial court, the Arizona State Supreme Court did not have the benefit to consider firsthand the conflicting testimony and evidence presented on this issue.

The Arizona State Supreme Court concluded that ". . . it was erroneous to characterize a dispute that *did not yet exist* as a 'pending item' within the meaning of the parties' agreement." (italics added). The Arizona State Supreme Court disregarded the evidence which was presented to the trial court on this very point. As was clearly presented to the trial court, the parties' settlement agreement specifically refers to the additional loads or invoices to be delivered *after* the date of the parties' settlement agreement. By Respondent's letter to Petitioner, the settlement agreement referenced further loads of stone materials. Therefore, facts were presented to the trial court contrary to the Arizona State Supreme Court's determination that material quantities were not a pending item within the parties' settlement agreement.

The parties clearly contemplated a final and complete settlement of all matters related to the lump sum agreement. The settlement agreement is analogous to a personal injury settlement where the parties have no certainty as to future medical expenses, and yet the parties agree to finally resolve a dispute for an agreed upon amount. The trial court was presented with the evidence on the settlement agreement and properly concluded that the parties intended a complete settlement.

The trial court considered and weighed the testimony and evidence and adopted findings and conclusions based upon the record. The trial court had ample evidence before it to support its findings that the parties agreed to settle all pending items and that the settlement agreement was supported by good and valuable consideration. The Arizona State Supreme Court indicated that "[i]t also seems extremely unlikely that a seller would waive a claim in excess of $100,000 in return for splitting costs on a single air freight." The evidence presented to the trial court proved that there was a factual dispute as to the amounts that Petitioner and Respondent were giving as consideration for the settlement agreement. Evidence was presented that Petitioner

had substantial offsets to Respondent's claim. The trial court weighed the evidence and determined that a settlement agreement existed. The fact finder specifically determined that the settlement agreement was supported by good and valuable consideration. The Arizona State Supreme Court improperly valued the consideration which was given for the settlement agreement rather than deferring to the trial court's determination.

The Arizona State Supreme Court has mistakenly substituted its interpretation of the facts and concluded that the trial court committed an error of law. The Arizona State Supreme Court changed the facts. If the trial court had been presented with the facts which the Arizona State Supreme Court seems to have believed existed, then there likely would not have been a lawsuit in the first place.

By overturning the decisions by the trial court and the Court of Appeals, the Arizona State Supreme Court has caused a travesty of justice and deprived Petitioner of due process. The Arizona State Supreme Court has substituted its judgment for that of the lower courts on matters which should have been left to the purview of the lower courts. The Arizona State Supreme Court has overstepped its authority by crafting a decision that ignores the trial court's findings. The far reaching effect of such unchecked activity is the denial of due process to Arizona litigants.

CONCLUSION

This case presents a question of exceptional importance. If the opinion below is allowed to stand, then Petitioner will have been denied due process and will forever suffer the consequences of a decision that represents a complete departure from the long recognized, limited standard of appellate review. By granting the petition for certiorari, however, this Court can

correct the Arizona State Supreme Court's decision, which defies this Court's traditional holdings that a litigant has a due process right to a fair consideration of its case. In so doing, this Court can also reaffirm the important role of deference to the original finder of fact.

Due process requires a fair trial and a determination made by the trial court based upon evidence. Petitioner received due process in this case at the trial court level and at the Court of Appeals. Petitioner was, however, deprived of its fundamental due process right by the Arizona State Supreme Court. The Arizona State Supreme Court erroneously overturned the decisions by the trial court and the Court of Appeals based upon a clear misunderstanding of the true facts of the case. Petitioner recognizes appellate courts' proper authority in setting aside clearly erroneous factual determinations. This authority does not empower an appellate court to completely disregard determinations of fact finders that are supported by the record. Due process is lost unless standards of review including deference to the trial court's findings are employed in appeals.

Accordingly, Petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

CRAIG L. KELLER
Counsel of Record
KELLER & HICKEY
A Professional Corporation
Attorneys for Petitioner
One Windsor Professional Building
2627 North Third Street
Phoenix, Arizona 85004-1188
(602) 266-2110

APPENDIX A — MEMORANDUM DECISION OF THE SUPREME COURT OF ARIZONA, EN BANC FILED MAY 6, 1997

SUPREME COURT OF ARIZONA

En Banc

Supreme Court
No. CV-96-0227-PR

Court of Appeals
No. 1 CA-CV 93-0467

Maricopa County
No. CV 90-33812

MEMORANDUM DECISION
(Not for Publication - Rule 111, Rules of the Supreme Court)

GIUSEPPE FURRER, S.P.A., an Italian corporation,

Plaintiff-Appellant,

v.

JOHN F. VICKERS MASONRY, an Arizona corporation,

Defendant-Appellee.

Appeal from the Superior Court of Arizona
in Maricopa County

The Honorable Armando de Leon, Judge

VACATED IN PART

Appendix A

Memorandum Decision of the Court of Appeals

Division One

Filed February 13, 1996

VACATED IN PART

Law Offices of William M. Piatt, P.C. Phoenix
By William M. Piatt
Attorney for Guiseppe Furrer, S.P.A.

Keller & Hickey Phoenix
By Craig L. Keller
Thomas F. Hickey
Attorneys for John F. Vickers Masonry

MARTONE, Justice.

This is an action in contract for the unpaid balance of goods sold and delivered. The trial court found in favor of the buyer, and the seller appealed. The court of appeals affirmed, and we granted review only to correct an error of law.

The original contract called for the seller to cut and ship specific pieces of marble and granite to the buyer for $461,132. As the construction of the building progressed, pursuant to industry custom, the buyer sent to the seller separate orders for specific pieces of stone. The seller cut and shipped stone in accordance with these individual orders even though they varied from the original contract document. The invoices for the stones and labor actually ordered by the buyer amounted to $555,360. The buyer paid each invoice as drawn but stopped paying after $447,366. The seller's action sought the difference of $105,000. After a trial to the court, the judge concluded that the contract

remained a lump sum contract "even though modified to some extent by agreement of the parties during the performance of the contract." Findings of Fact and Conclusions of Law, Mar. 18, 1993 at 7. The court found against the seller.

The court of appeals described the issue as "whether the parties entered a fixed-price contract governing the entire course of their dealings or whether they agreed to a series of individual orders and purchases, each requiring payment in full," Mem. Decision at 3, and affirmed the trial court's finding that the contract was for a fixed price. It did not expressly address the consequence of contract modification. The court of appeals also affirmed the trial court's finding that an agreement by the seller and buyer to split the cost of air freight for the seventeenth shipment of stone extinguished the seller's claim for the unpaid balance of goods cut and shipped.

We are of the view that the trial court erred as a matter of law in concluding that the original contract price was binding notwithstanding contract modification. We also conclude that the trial court's finding that the air freight agreement extinguished the unrelated claim for the unpaid balance was clearly erroneous.

I. Contract Modification

Neither the trial court nor the court of appeals addressed the legal effect of contract modification. No one disputes that the original contract was for a fixed price. But that contract price only applied to certain stone. A contract, of course, can be modified. The trial court found that the parties, by agreement, had modified their contract to ship different stone. The court of appeals acknowledged that "[t]he parties agree that, when the time for performance of the contract came, Vickers requested,

and Furrer provided, stone differing from that described in the contract." Mem. Decision at 4-5. The buyer changed the stone to be delivered. The seller complied with the request, shipped the different stone, and billed for the different price. Until the very end, the buyer paid the price as billed.

It is plain that contract modification occurred here. Had the seller shipped the original stone, then the seller would have been bound by the original price. But when the buyer changed the stone and the parties agreed to the change, then the parties could not expect that the original price would still apply. The issue was not whether the parties entered into a fixed price contract or whether they agreed to a series of individual orders. In fact, they did both. They first entered into a fixed price contract, and then they changed it. Here, the buyer ordered, received, and accepted the marble as cut and shipped. Thus, this contract was modified under A.R.S. §§ 47-2201(C)(3) and 47-2209.

Having found that the contract had been modified, the trial court erred as a matter of law in concluding that the buyer had no obligation to pay the price for the different goods and labor it ordered.

II. The Settlement Agreement

The buyer and seller had some disputes over cuts, breakages, and timing. The buyer wanted the seventeenth shipment air freighted, which cost more than the ocean freight they otherwise used. The seller offered to split the additional cost of the seventeenth delivery "to close down every pending item with you." The trial court found that this was an agreement not only to resolve the dispute over the air freight and the then-existing disputes over cuts, breakages, and timing, but also to extinguish

the seller's claim for the balance due for goods sold and delivered. But as we understand the evidence, the dispute over the unpaid balance of goods sold and delivered did not even exist at the time the parties resolved the air freight and breakage questions. Up to this point, the buyer was paying the seller the new price for the new goods. Thus, it was erroneous to characterize a dispute that did not yet exist as a "pending item" within the meaning of the parties' agreement. It also seems extremely unlikely that a seller would waive a claim in excess of $100,000 in return for splitting costs on a single air freight delivery. The trial court's finding to the contrary is thus clearly erroneous.

III. Conclusion

We therefore vacate in part the judgment of the trial court and the memorandum decision of the court of appeals on these two issues only, and remand the case to the trial court for new findings and conclusions in connection with the seller's claim for unpaid goods pursuant to the contract as modified, and unaffected by any claimed settlement agreement. Believing that the trial court and the court of appeals were correct with respect to issues three and four upon which review was granted, we now dismiss them as having been improvidently granted.

Frederick J. Martone, Justice

CONCURRING:

Thomas A. Zlaket, Chief Justice

Charles E. Jones, Vice Chief Justice

Stanley G. Feldman, Justice

James Moeller, Justice

APPENDIX B — MEMORANDUM DECISION OF THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE FILED FEBRUARY 13, 1996

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CV 93-0467

DEPARTMENT E

GIUSEPPE FURRER, S.P.A., an Italian corporation,

Plaintiff-Appellant,

v.

JOHN F. VICKERS MASONRY, an Arizona corporation,

Defendant-Appellee.

Appeal from the Superior Court of Maricopa County

Cause No. CV 90-33812

The Honorable Armando de Leon, Judge

AFFIRMED

MEMORANDUM DECISION

(Not for Publication — Rule 28, Arizona Rules of Civil Appellate Procedure)

Appendix B

Law Offices of William M. Piatt, P.C.
by William M. Piatt
and J. Scott Conlon
Attorneys for Appellant — Phoenix

Keller & Hickey, P.C.
by Craig L. Keller
and Thomas F. Hickey
Attorneys for Appellee — Phoenix

McGREGOR, Judge

Giuseppe Furrer, S.P.A. (Furrer) appeals from a judgment of the trial court in favor of John F. Vickers Masonry (Vickers). The issues presented are whether the trial court erred in concluding that the contract between the parties was a fixed-price contract, whether the trial court abused its discretion in awarding attorneys' fees, and whether the record provides evidence of judicial misconduct sufficient to overturn the trial court's decision. We have jurisdiction over this appeal pursuant to Arizona Revised statutes Annotated (A.R.S.) section 12-2101.

I.

Furrer is an Italian corporation that distributes stone products throughout the world. Furrer has no office in Arizona, but deals through independent brokers. Vickers is an Arizona corporation that operates as a masonry subcontractor dealing in large commercial projects.

On May 12, 1988, Robert Emery, an intermediary, contacted Furrer and requested a bid for stonework needed by Vickers for a project in Phoenix. Based on Emery's description of the

edgework and stone materials to be used on the project, Furrer submitted a bid of $461,132. Furrer's detailed bid specifically described the stonework and included the cost of labor, shipping, and insurance. At this point, neither Emery nor Furrer had received a set of architectural drawings for the project; Emery's specifications were based on a "take-off" provided by Vickers.

Evidence presented at trial showed that the trade custom of the stone industry required the purchaser to submit an order, known as a "shop ticket," specifying the exact amount of stone needed and detailing the type of stone, cut, and edgework. In this case, Emery sent a "sales order" to Furrer on October 22, 1988 that matched the request for the bid issued in May. On November 26, 1988, Emery sent a purchase order to Furrer for $461,131 specifying that it was for all the stone described in the October sales order.

When the time for the actual production of the stone arose, Emery sent a series of shop tickets to Furrer specifying the exact stone and cuts to be shipped to Vickers. Although the shop tickets differed from the original purchase order, Furrer sent each shipment as described in the shop tickets and invoiced Vickers for each shipment. The invoices sent to Vickers with the stone totalled more than $80,000 above the amount in the bid and the purchase order.

At various times, Vickers complained about mistakes in the production of the stone, breakage, and other items. Before shipping the final container of stone, Furrer offered to settle any disputed items by splitting the cost of sending the last shipment air freight to Phoenix rather than by water and land. At this point, Vickers owed Furrer approximately $103,000 per the invoices. Vickers agreed to Furrer's proposed settlement,

but after receiving the final shipment, refused to pay the outstanding balance. This lawsuit ensued.

II.

The dispositive issue is whether the parties entered a fixed-price contract governing the entire course of their dealings or whether they agreed to a series of individual orders and purchases, each requiring payment in full. If a fixed-price contract exists, Vickers' only obligation is to pay the contract price. If an ongoing series of purchases controls the parties' relationship, however, Vickers must pay the entire cost of the materials received and used.

When reviewing the findings of a trial court, we give great deference to the trial court's findings of fact. *Milberger v. Chaney Bldg. Co.*, 146 Ariz. 181, 704 P.2d 822 (App. 1985). We will not disturb the trial court's factual findings unless clearly erroneous. *Federoff v. Pioneer Title & Trust Co.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990). We review questions of law *de novo* and review mixed questions of fact and law *de novo* for errors of law. *Lee Dev. Co. v. Papp*, 166 Ariz. 471, 475-76, 803 P.2d 464, 468-69 (App. 1990).

The trial court found, and Furrer acknowledged, that a contract existed between the parties when Emery issued the November 26, 1988 purchase order to Furrer. The court determined that a contract resulted from Vickers' acceptance of Furrer's bid, which the parties agree was definite in all material terms. Thus, the trial court concluded that the contract was a fixed-price contract, and ordered Vickers to pay the contract price, rather than the invoiced amounts. The record contains ample support for this factual determination, and we will not overturn it.

Appendix B

III.

Furrer next contests the trial court's conclusion that the parties entered a settlement agreement governing disputes arising from the contract. As stated above, this court will not disturb the factual findings of the lower court absent a clear abuse of discretion. *Fedoroff,* 166 Ariz . at 388, 803 P.2d at 109.

The parties agree that, when the time for performance of the contract came, Vickers requested, and Furrer provided, stone differing from that described in the contract. Vickers contends that the changes were minor and that Furrer bargained away any right to dispute the difference in value as a part of the agreement under which each party paid one-half of the air freight cost for the final shipment of stone. Furrer contends that, because each shipment was accompanied by an invoice, Vickers' acceptance of each shipment constituted an individual agreement to pay the invoiced price. Furrer also contends' that neither party advanced the "settlement theory" and that Furrer proposed it only as a defense to a counterclaim brought by Vickers for small disputed items, including chargebacks totaling less than $10,000.

The trial court found that the agreement to split the air freight cost for the last shipment constituted a settlement governing any disputes over the contract. Specifically, the court stated:

> THE COURT FINDS that Plaintiff/ Counterdefendant FURRER waived any right it had to demand a 20.4% price increase as a result of its claimed waste factor and time-consuming cutting activity as a result of Defendant/Counterclaimant VICKERS

> requesting bigger sizes of stone and a variety of different stone cuttings.

The court concluded that the effect of the settlement was to resolve all claims by either party to the contract, with the exception that Vickers had to pay the $20,000 unpaid balance of the original contract price.

The record supports the trial court's conclusion that the settlement agreement governed any conflicts in the performance of the contract. In an exchange of faxes, the parties agreed to resolve any differences by splitting the cost of shipping the final container by air freight. Furrer's fax to Vickers stated in part:

> In order to help you at our best and to close down every pending item with you, we are willing to share at fifty percent this amount with you.

Although the parties presented conflicting and confusing testimony regarding their understanding of which issues the agreement resolved, the trial judge is better able than are we to resolve the contradictions. The record provides ample support for the trial court's finding, and we defer to the trial court on this factual question.

IV.

Furrer alternatively contends that, even if a fixed-price contract existed, it should recover the value of the stone it actually shipped under a quantum meruit theory. Quantum meruit is an equitable remedy based upon the principle that a party unjustly enriched at the expense of another should compensate

the other for that enrichment. *City of Sierra Vista v. Cochise Inter.*, 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984). To successfully claim unjust enrichment, a claimant must prove the following elements: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a remedy provided by law. *Stapley v. American Bathtub Liners, Inc.*, 162 Ariz . 564, 568, 785 P.2d 84, 88 (App. 1989). Here, the trial court found neither an enrichment nor an impoverishment. However, we need not address the trial court's finding because, even assuming that there was an enrichment and an impoverishment, the settlement agreement would preclude recovery for unjust enrichment.

V.

Furrer next contests the trial court's award of attorneys' fees. During discovery, Vickers' counsel delivered a set of requests for admissions to Furrer's counsel. Furrer failed to timely respond to this request and did not request an extension. Victors subsequently moved for summary judgment based upon the perceived admissions by Furrer. The trial court denied the motion for summary judgment and granted Furrer leave to amend the complaint. However, the trial court sanctioned Furrer by assessing attorneys' fees of $9,000 pursuant to A.R.S. sections 12-349 and 12-350.

This court views a trial court's award of attorneys' fees in the light most favorable to supporting the award and will affirm the award unless clearly erroneous. *Heuisler* v. *Phoenix Newspapers, Inc.*, 168 Ariz. 278, 284, 812 P.2d 1096, 1102 (App. 1991). In the present case, we conclude that the trial court acted

well within its discretion in awarding attorneys' fees for Furrer's behavior, which pointlessly prolonged the litigation.

VI.

Furrer argues finally that the trial court inappropriately adopted Vickers' proposed findings of fact and law, which Furrer argues constituted judicial misconduct. In support of this contention, Furrer relies on our statement in *Elliott v. Elliott*, 165 Ariz. 128, 796 P.2d 930 (App. 1990), that "the court may not rely upon the parties to prepare findings that support its judgment." *Id.* at 134, 796 P.2d at 936.

Here, the trial court issued a lengthy and detailed minute entry setting forth its findings of fact and law. The trial court also ordered the parties to prepare and submit joint findings and conclusions. However, the parties could not reach an agreement upon the findings. The trial court ultimately accepted the findings of fact and conclusions of law as submitted by Vickers, which were virtually identical to those set forth in the court's earlier minute entry. Because the trial court independently reached the findings and conclusions contained in the document Vickers submitted, we find no error.

VII.

For the reasons detailed above, we affirm the trial court's Judgment. In our discretion, we award Vickers costs and reasonable attorneys' fees for this appeal pursuant to A.R.S section 12-341.01 upon compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

Appendix B

s/ Ruth V. McGregor
Ruth V. McGregor, Judge

CONCURRING:

s/ Sheldon H. Weisberg
Sheldon H. Weisberg, Presiding Judge

s/ Cecil B. Patterson
Cecil B. Patterson, Judge

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED MARCH 18, 1993

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. CV 90-33812

(Assigned to the Honorable Armando de Leon)

GIUSEPPE FURRER, S.P.A., an Italian corporation,

Plaintiff/
Counterdefendant,

vs.

JOHN F. VICKERS MASONRY, an Arizona corporation,

Defendant/
Counterclaimant,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial before the Honorable Armando de Leon, sitting without a jury, the Plaintiff/ Counterdefendant GIUSEPPE FURRER, S.P.A., (hereinafter referred to as "FURRER"), appearing by and through its counsel William M. Piatt, and the Defendant/Counterclaimant JOHN F. VICKERS MASONRY (hereinafter referred to as "VICKERS"), appearing by and through its counsel Craig L. Keller. The court having heard the testimony and considered the evidence presented makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52, Arizona Rules of Civil Procedure:

Appendix C

FINDINGS OF FACT

1. THE COURT FINDS that the court has jurisdiction of the subject matter of this action.

2. THE COURT FINDS that the court has **in personam** jurisdiction of the parties.

3. THE COURT FINDS that Plaintiff/Counterdefendant FURRER is an Italian corporation which supplies stone materials.

4. THE COURT FINDS that Defendant/Counterclaimant VICKERS is, and was, at all times material hereto, an Arizona corporation.

5. THE COURT FINDS that Defendant/Counterclaimant VICKERS is, and was, at all times material hereto, a stone masonry subcontractor duly licensed in Arizona.

6. THE COURT FINDS that Robert Emery of R.E. Emery & Associates played a dual role in the transactions between Plaintiff/Counterdefendant FURRER and Defendant/ Counterclaimant VICKERS.

7. THE COURT FINDS that the role R.E. Emery played with respect to Plaintiff/Counterdefendant FURRER was that of a broker or a "hunter" to bring the parties together for the purpose of consummating the transaction.

8. THE COURT FINDS that after bringing the parties together, Robert Emery was, in fact, the agent of Defendant/ Counterclaimant VICKERS for purposes of drafting shop

drawings and shop or cut tickets, as well as for administering the transactions in terms of shipments, payments of invoices and facilitating communications between the parties.

9. THE COURT FINDS that the purchase order issued by the broker to Plaintiff/Counterdefendant FURRER appears, on its four corners, to be a response to a bid, which in turn was made to an invitation for a bid.

10. THE COURT FINDS that when the purchase order was issued on November 26, 1988, the parties had an understanding on all essentials and intended to be bound by the terms of the purchase order, supplemented by prior documents used as the basis for and leading to the purchase order.

11. THE COURT FINDS that notwithstanding the fact that this court permitted the action of Plaintiff/Counterdefendant FURRER to survive the Motion for Involuntary Dismissal by Defendant/Counterclaimant VICKERS, and in doing so allowed that *quantum meruit* on an implied by law contract would be considered, the court now concludes that the terms of payment were for a fixed price or lump sum contract.

12. THE COURT FINDS that there was no enrichment on the part of Defendant/Counterclaimant VICKERS or an impoverishment on the part of Plaintiff/Counterdefendant FURRER.

13. THE COURT FINDS that Plaintiff/Counterdefendant FURRER delivered some stone materials cut and finished to size, as ordered by Defendant/Counterclaimant VICKERS.

14. THE COURT FINDS that between May 12, 1989, and

on or about May, 1990, Plaintiff/Counterdefendant FURRER supplied stone products which Defendant/Counterclaimant VICKERS used to complete all exterior and interior marble and granite work at Phase B of the Esplanade Project. The stone materials used on the Esplanade Project include **rosa limbara** which is light gray granite with pinkish inclusions produced in Sardinia Island; **verde acceglio** which is dark green marble with light colored veins or inclusions; and **alpenina** which is a pinkish colored marble from Spain which has some white veins. The only source in the world for **verde acceglio** marble is in the western Alps in Italy in a quarry owned by Plaintiff/ Counterdefendant FURRER. **Alpenina** is quarried in Portugal. The parties agreed to substitute **rose atlantide** which is a pinkish marble with white veins quarried in Portugal for the **alpenina** materials required on the Esplanade Phase B Project.

15. THE COURT FINDS that the materials delivered by Plaintiff/Counterdefendant FURRER to Defendant/ Counterclaimant VICKERS were identified by nineteen (19) specific invoices, all as attached to FURRER's prior motion for summary judgment filed in this action.

16. THE COURT FINDS that Plaintiff/Counterdefendant FURRER delivered the materials and provided the labor identified in Invoice Nos. 1 through 19.

17. THE COURT FINDS that Defendant/Counterclaimant VICKERS ordered the stone materials and labor set forth in Invoice Nos. 1 through 19 dated May 12, 1989, through February 9, 1990, by means of the purchase order, shop drawings, shop tickets and other communications involving VICKERS, R. E. Emery & Associates, and personnel of Plaintiff/ Counterdefendant FURRER.

Appendix C

18. THE COURT FINDS that Defendant/Counterclaimant VICKERS has paid Plaintiff/Counterdefendant FURRER the sum of $447,366.06 in nine (9) separate payments as follows:

DATE	CHECK NO.	AMOUNT
6/26/89	3567	$ 31,738.94
7/26/89	3663	$ 28,998.78
8/20/89	3706	$ 25,237.11
9/27/89	3855	$ 164,827.32
10/18/89	3927	$ 28,357.76
11/27/89	4060	$ 67,223.02
12/27/89	4144	$ 23,103.42
1/29/90	4221	$ 52,894.44
2/9/90	4262	$ 24,985.27

19. THE COURT FINDS that the payments made by Defendant/Counterclaimant VICKERS to Plaintiff/ Counterdefendant FURRER discharges all but $2,000.00 for Invoice No. 2193. Invoice Nos. 123, 165 and 190 remain unpaid.

20. THE COURT FINDS that none of the goods delivered by Plaintiff/Counterdefendant FURRER to Defendant/ Counterclaimant VICKERS have been returned to FURRER.

21. THE COURT FINDS that the goods delivered by Plaintiff/Counterdefendant FURRER to Defendant/ Counterclaimant VICKERS have in fact been used, consumed or disposed of according to VICKERS' wishes.

22. THE COURT FINDS that full payment by Defendant/ Counterclaimant VICKERS has not been made, represented by the difference in purchase order lump sum agreement and payments made by Defendant/Counterclaimant VICKERS.

Appendix C

23. THE COURT FINDS that Plaintiff/Counterdefendant FURRER and Defendant/Counterclaimant VICKERS agreed that each share one-half of the cost of air shipment of container No. 17, and that such agreement constituted a settlement on the then-known items in dispute.

24. THE COURT FINDS that Defendant/Counterclaimant VICKERS, by agreeing to the arrangement concerning container No. 17 and paying one-half of the agreed air freight, waived any right VICKERS had to recover rework fabrication costs; any difference between material shortages less material overages; and for materials, 20 slabs of 3 cm **castilla bianca**, or its monetary equivalent claimed under the Citibank Project.

25. THE COURT FINDS that Defendant/Counterclaimant VICKERS received stone materials with labor barely sufficient to complete the contract, including some "extras" totaling $19,893.28, which VICKERS knew it was obligated to pay, subject to adjustments for shortages and refabrication.

26. THE COURT FINDS that the overage was part of the consideration Defendant/Counterclaimant VICKERS received for waiving other claims pending with Plantiff/Counterdefendant FURRER.

27. THE COURT FINDS that Plaintiff/Counterdefendant FURRER waived any rights it had to recover $19,893.28 for "extras" [1) Size of stone (a) 4-5 cm **rosa limbara** = $7,869.94; (b) 2-3 cm **verde acceglio** = $11,249.53; 2) Brass strips = $299.21; and, 3) floor dots = $474.60.] These extras were acknowledged by Defendant/Counterclaimant VICKERS to be over and above the lump sum fixed price of the purchase order.

Appendix C

28. THE COURT FINDS that Plaintiff/Counterdefendant FURRER waived any right it had to demand a 20.4% price increase as a result of its claimed waste factor and time-consuming cutting activity as a result of Defendant/Counterclaimant VICKERS requesting bigger sizes of stone and a variety of different stone cuttings.

29. THE COURT FINDS that the agreement of both parties to this partial settlement was supported by good and valuable consideration.

30. THE COURT FINDS that according to the terms of Defendant/Counterclaimant VICKERS' subcontract, VICKERS was required to have the architect's approval of materials pursuant to samples prior to VICKERS' installation of the materials.

31. THE COURT FINDS because of time constraints under Vickers subcontract, Vickers installed certain green marble within the confines of the main lobby floor as well as the mezzanine lobby floor without approval of the architect or prior inspection of materials by the general contractor.

32. THE COURT FINDS that all of the marble shipped to Defendant/Counterclaimant VICKERS for use in the main and mezzanine lobby floors and other interiors came from the Plaintiff/Counterdefendant FURRER's quarry in the Italian Alps.

33. THE COURT FINDS that except for twenty (20) pieces of **verde acceglio** marble valued at about $2,500.00, the remainder of the **verde acceglio** marble was as bargained for and should not have been rejected by either the general contractor or the owner.

34. THE COURT FINDS that the type of **verde acceglio** marble demanded by the general contractor and owner in terms of the replacement floor was not justified.

35. THE COURT FINDS that there is little, if any, difference from the **verde acceglio** marble originally supplied by Plaintiff/Counterdefendant FURRER and as opposed to the later **verde acceglio** marble obtained from the stock supplies of another independent supplier, which was used for the replacement floors.

36. THE COURT FINDS that Plaintiff/Counterdefendant FURRER and Defendant/Counterclaimant VICKERS retained attorneys to prosecute and defend the claims in this action.

37. THE COURT FINDS that on October 31, 1991, Honorable Elizabeth Stover entered an Order imposing the sum of $150.00 for attorney's fees against Plaintiff for failure to timely produce certain discovery.

38. THE COURT FINDS that on February 6, 1992, Plaintiff paid Defendant $150.00 as and for the sanctions ordered by the Court on October 31, 1991.

39. THE COURT FINDS that on August 13, 1992, Honorable Elizabeth Stover entered an Order awarding Defendant reasonable attorney's fees incurred by Defendant in preparing a Motion for Summary Judgment based upon Plaintiff's failure to answer Defendant's Request for Admissions.

40. THE COURT FINDS that on October 30, 1992, Honorable Elizabeth Stover entered an Order awarding Defendant the sum of $9,000.00 as reasonable attorney's fees

to be deducted from any award made to Plaintiff or to be added to any Judgment entered in favor of Vickers.

41. THE COURT FINDS that on December 4, 1992, Honorable Elizabeth Stover entered an Order granting Defendant's Motion for Sanctions and awarded Defendant attorney's fees of $300.00 and Court Reporter's appearance fee of $42.00 for a total of $342.00 against Plaintiff, and the sum of $42.00 against William M. Piatt, personally.

CONCLUSIONS OF LAW

1. THE COURT CONCLUDES that neither party is to be considered the prevailing, winning, or successful party.

2. THE COURT CONCLUDES that the purchase order in this case, coupled with documents leading thereto, constituted a contract for a fixed price and remained a lump sum contract, even though modified to some extent by agreement of the parties during the performance of the contract.

3. THE COURT CONCLUDES that because Plaintiff/ Counterdefendant FURRER has withdrawn its original simple contract claim in light of a motion for summary judgment claiming payment in full in the sum of $447,366.06 against a contract price of $441,505.00, whereas in fact payment in full would have required a payment of $461,132.00, in order to prevent manifest injustice, FURRER is entitled to recover the sum of $13,765.94 under the theory of simple contract.

4. THE COURT CONCLUDES that Plaintiff/ Counterdefendant FURRER is responsible for at least twenty (20) pieces of **verde acceglio** which were not acceptable and which had a value of $2,500.00.

Appendix C

5. THE COURT CONCLUDES that Defendant/Counterclaimant VICKERS is entitled to a nominal recovery of $2,500.00, on the **verde acceglio** floors' materials and that amount will offset the judgment to be entered against VICKERS in favor of Plaintiff/Counterdefendant FURRER.

6. THE COURT CONCLUDES that Plaintiff/Counterdefendant FURRER is not entitled to recover under *quantum meruit* — implied by law contract.

7. THE COURT CONCLUDES that Plaintiff/Counterdefendant FURRER is not entitled to recover under promissory estoppel because such a theory was not plead or proved by the weight of the evidence as a cause of action against the Defendant/Counterclaimant VICKERS.

8. THE COURT CONCLUDES that Plaintiff/Counterdefendant FURRER failed to establish the **prima facie** elements of an open account under the definition of open account recognized in Arizona.

9. THE COURT CONCLUDES that Plaintiff/Counterdefendant FURRER is not entitled to recover under open account.

10. THE COURT CONCLUDES that Plaintiff/Counterdefendant FURRER'S action is not barred by the statute of frauds, A.R.S. § 47-2201.

11. THE COURT CONCLUDES that Plaintiff/Counterdefendant FURRER'S action is not barred by any breaches of contract or for failure of consideration.

Appendix C

12. THE COURT CONCLUDES that Plaintiff/ Counterdefendant FURRER'S claims in excess of the purchase order contract price are barred by the terms of the contract.

13. THE COURT CONCLUDES that applications for an award of attorney's fees or taxable costs by either side to this lawsuit will not be entertained nor considered.

14. THE COURT CONCLUDES that any attorneys' fees or sanctions previously awarded in favor of Defendant/ Counterclaimant VICKERS by the Honorable Elizabeth Stover will be honored and may be included as an "offset" to Plaintiff/ Counterdefendant FURRER'S recovery.

15. THE COURT CONCLUDES that Vickers is entitled to an offset of $9,000.00 and interest thereon at the rate of 10% from October 30, 1992, for attorney's fees in connection with Vickers' Motion for Summary Judgment.

16. THE COURT CONCLUDES that Vickers is entitled to an offset of $342.00 and interest thereon at the rate of 10% from December 4, 1992, in connection with Vickers' Motion for Sanctions.

DONE IN OPEN COURT this 18 day of March, 1993.

s/ Armando de Leon
HONORABLE ARMANDO de LEON
JUDGE OF THE SUPERIOR COURT

APPENDIX D — JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED MARCH 18, 1993

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CV 90-33812

(Assigned to the Honorable Armando de Leon)

GIUSEPPE FURRER, S.P.A., an Italian corporation,

Plaintiff/Counterdefendant,

vs.

JOHN F. VICKERS MASONRY, an Arizona corporation,

Defendant/Counterclaimant,

JUDGMENT

This matter having come on regularly for trial before the Honorable Armando de Leon, the Plaintiff/Counterdefendant, Giuseppe Furrer, S.P.A. (hereinafter referred to as "FURRER") appearing by and through its counsel, William M. Piatt, and the Defendant/Counterclaimant, John F. Vickers Masonry (hereinafter referred to as "VICKERS") appearing by and through its counsel, Craig L. Keller.

The Court having heard the testimony and considered the evidence, enters Judgment as follows:

Appendix D

1. In favor of Plaintiff/Counterdefendant FURRER in the sum of $11,265.94 together with interest thereon at the rate of 10% per annum from the date of Judgment until fully paid;

2. In favor of Defendant/Counterclaimant VICKERS in the sum of $9,000.00 together with interest at the rate of 10% per annum thereon from October 30, 1992, which sum shall be offset against the sum awarded to Furrer in Paragraph 1, above; and

3. In favor of Defendant/Counterclaimant VICKERS in the sum of $342.00 together with interest thereon at the rate of 10% per annum from December 4, 1992, which sum shall be offset against the sum awarded to Furrer in Paragraph 1, above.

4. Each party shall bear its own attorney's fees and costs.

DONE IN OPEN COURT this 18 day of March, 1993.

s/ Armando de Leon
The Honorable Armando de Leon
JUDGE OF THE SUPERIOR COURT

APPENDIX E — ORDER FROM THE SUPREME COURT OF THE STATE OF ARIZONA DENYING APPELLEE'S MOTION FOR RECONSIDERATION FILED JUNE 5, 1997

SUPREME COURT
State of Arizona
402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-9396

Noel K. Dessaint
Clerk Of Court

Kathleen E. Kempley
Chief Deputy Clerk

June 9, 1997

RE: GIUSEPPE FURRER, S.P.A. vs. JOHN F. VICKERS MASONRY
Supreme Court No. CV-96-0227-PR
Court of Appeals No. 1 CA-CV 93-0467
Maricopa County No. CV 90-33812

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 5, 1997, in regard to the above-referenced cause:

ORDERED: Appellee's Motion for Reconsideration = DENIED.

NOEL K. DESSAINT, Clerk

Appendix E

TO:

William M. Piatt, Esq. and J. Scott Conlon, Esq., Law Offices of William M. Piatt PC

Craig L. Keller, Esq. and Thomas F. Hickey, Esq., Keller & Hickey PC

Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix

jls

Supreme Court, U.S.
FILED
OCT 17 1997
CLERK

No. 97-492

In The

Supreme Court of the United States

October Term, 1997

JOHN F. VICKERS MASONRY,
AN ARIZONA CORPORATION,

Petitioner,

v.

GUISEPPE FURRER, S.P.A.,
AN ITALIAN CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM M. PIATT*
2700 N. Central Avenue, #1150
Phoenix, Arizona 85004
(602) 264-0114
Counsel for Respondent
Guiseppe Furrer, S.P.A.
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should this Court exercise jurisdiction to review a decision of the Arizona Supreme Court which reversed trial court findings as "clearly erroneous" and legal rulings upon commercial law issues as "error;" where no Constitutional issue regarding the issues has been raised and ruled upon below?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 1

Reasons for Denial of the Petition 7

I. The Decision Below Denied No Procedural Due Process and Properly Corrected Errors of Law and Fact in the Trial Court 7

II. There Is No Basis For Review Upon Certiorari ... 13

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES CITED:

Board of Regents v. Phoenix Newspapers, 167 Ariz. 254, 806 P.2d 348 (Ariz. 1991) 13

STATUTES:

28 U.S.C. § 1257 ..... 1, 15

U.C.C. § 2-607 11

A.R.S. § 42-2607 11

RULES CITED:

Rule 14(1)(g)(i), U.S. Supreme Court 14

Ariz. Const. Art. 6, § 5 13

Arizona Rule of Civil Procedure 16(e) 10

STATEMENT OF JURISDICTION

Petitioner's Statement of Jurisdiction is disputed. Although jurisdiction is claimed to subsist under 28 U.S.C. § 1257, the case does not represent a request for review of a state supreme court order " . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . . " This Court has therefore no enacted jurisdictional basis of review.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition raises no Constitutional provisions which have been raised, heard, or ruled upon below.

STATEMENT OF THE CASE

This petition arises from an action filed in Maricopa County Superior Court to collect a balance of $107,993.73 due to the Guiseppi Furrer Co., a leading Italian producer of granite and marble building materials, from the Vickers Company (now Vickers-Hari Contracting) for stone products which had been purchased for, and used in, constructing the Esplanade office complex in Phoenix for its developer, the Symington Company. (Pet. App. C)

The contract for these materials began in October, 1988, in a one-page facsimile message from Emery, a Florida stone broker acting for Vickers, soliciting a bid from Furrer for certain listed and described materials in general size ranges and round sum quantities, all to be

delivered cut and finished according to specific instructions to be transmitted at a subsequent time as the stonework was scheduled and shop drawings prepared. Furrer faxed a bid back to the broker in a gross amount of $461,131.52. An acceptance of the bid was sent back to Furrer by Emery on November 26, 1988. Prior to the start of production, the buyers visited the Furrer plant in Carrara, Italy to schedule the job. No further agreements were negotiated or signed and the original takeoff sent to Furrer in the solicitation (contractor's estimate of the materials needed as determined from the design) was not reviewed or amended. (Pet. App. C)

Consistent with practice in the business, the stone materials were systematically cut and finished from individual drawings of each stone piece prepared by Emery's draftsman and sent to Furrer. Shipments were assembled and dispatched to meet Vicker's building schedule by ocean freight in standard containers and invoiced against 60-day payment by Vickers. Over a 9-month period, some 9 shipments were sent, and invoices for $447,366.06 were transmitted and timely paid. (Pet. App. C. ¶18) No questions were raised as to prices or quantities and it is undisputed that the stone cut, finished, and shipped was exactly in compliance with the drawings and shipment orders placed. (Pet. App. C, ¶¶16-18) No material out of thousands of individual pieces was rejected or returned. From time to time, small issues arose over mis-cut stone pieces, delayed delivery, and similar issues which in the aggregate, never reached a total of $10,000 and which were corrected on-site. Normally, these items could be back-charged or adjusted in the final invoices. The orders were first placed in April, 1989 and completed to Furrer

in November. The last stone was shipped from Italy in February, 1990.

In early 1990, when Furrer was preparing the last few containers, it was learned that the owners of the Esplanade wished to open the facility in March, 1990. The normal mode of delivery would not have permitted timely completion. Air shipment would cost nearly $18,000. But, as an accommodation, Furrer offered to split this cost with Vickers. Mr. Palagi of Furrer wrote to Vickers as follows:

> In order to help you at our best and to close down every pending item with you, we are willing to share at 50% this amount with you. Please, confirm. Dott Mazzi informed to tell you that he enjoyed very much your reception of him in Phoenix and he hopes to reciprocate on your next trip to Italy.
>
> Jim, once again we want to inform you that we have never been notified that the grand opening of the Esplanade was to be on March 1, 1990 and for all the confusion mess happened with drawings and shop tickets which entirely due to the "broker" between the two of us. You can rest assured to have all our cooperation and friendship for future business on which we may work together.

In the reply, a letter from Jim Hari directly to Giovanni Palagi sent that day (1 February), Mr. Hari included the statement:

> Yes, we agree to 50% of air freight costs for container 17.

He then added:

> We wish to express our sincerest gratitude to Dr. Mazzi, yourself and all others who may have helped to clear up any misunderstandings that may have been encountered in the past. We also look forward to being able to work with you in the future.

At that time, not one word had been said about the remaining invoices to come and which were unbilled and unpaid, and none of the previous nine invoices were disputed. All disputes had been limited to credits and charge backs for stone that had to be recut, and a collection of charge back items to the stone finisher in Italy (some of which Furrer had subcontracted). The fundamental unit materials and labor cost as invoiced was never disputed, contested, or even discussed.

After the materials (and their invoices) arrived and the final installation of green marble (verde acceglio) was made on the floors, the owner rejected the installation on the basis that the stone contained excessive quartz veining and was thus nonconforming to the Vickers contract with the general contractor. Vickers was required to tear up $65,000 worth of marble and relay the floor with similar material from other vendors. After the floor was relayed without financial contribution from Furrer, Vickers made no further payments. This action followed.

The course of the litigation as represented by petitioner is subject to clarification. The original action filed was grounded upon a fixed-price contract, Furrer's counsel not being then aware of the changes occurring in administration which are outlined in argument below.

Vickers, who *was* aware of the changes, moved for summary judgment on a basis of "payment and satisfaction" without having previously pled this defense and without disclosing the invoice changes to the contract in discovery. In responding to the motion. Furrer's counsel learned of the changes and moved to amend the complaint, seeking recovery alternatively on open account. Vicker's counsel convinced the trial court that the theory of recover in the original complaint had misled Vickers into preparing the motion. The trial court *granted* Furrers' amendment and *denied* Vickers' motion, and accommodated Vickers' claims of surprise only to the extent of allowing Vickers an allowance against ultimate fees to be awarded Furrer in final judgment. Furrer was not ordered to pay anything. (Pet. App. C. ¶40).[1]

Vickers asserted at trial a counterclaim against Furrer for supplying nonconforming goods (the verde acceglio marble flooring) which was ultimately rejected by the Symington Company and which was the actual cause of Vickers' refusal to pay the remaining $105,000 due on the invoices. The trial court ruled against Vickers on this issue. (Pet. App. C):

> 30. THE COURT FINDS that according to the terms of Defendant/Counterclaimant VICKERS' subcontract, VICKERS was required to have the architect's approval of materials pursuant to

---

[1] Counsel for Defendant also attempted to reschedule Furrer's deposition in *Phoenix* in December, 1992, *after* the trial was continued and sought sanctions against counsel when he refused to direct the deponent to spend another $2,000 to travel to Phoenix anyway. (Pet. App. C, ¶41). The sanction ordered is *de minimis*.

samples prior to VICKERS' installation of the materials.

31. THE COURT FINDS because of time constraints under Vickers' subcontract, Vickers installed certain green marble within the confines of the main lobby floor as well as the mezzanine lobby floor without approval of the architect or prior inspection of materials by the general contractor.

32. THE COURT FINDS that all of the marble shipped to Defendant/Counterclaimant VICKERS for use in the main and mezzanine lobby floors and other interiors came from the Plaintiff/Counterdefendant FURRER's quarry in the Italian Alps.

33. THE COURT FINDS that except for twenty (20) pieces of verde acceglio marble valued at about $2,500.00, the remainder of the verde acceglio marble was as bargained for and should not have been rejected by either the general contractor or the owner.

34. THE COURT FINDS that the type of verde acceglio marble demanded by the general contractor and owner in terms of the replacement floor was not justified.

35. THE COURT FINDS that there is little, if any, difference from the verde acceglio marble originally supplied by Plaintiff/Counterclaimant FURRER and as opposed to the later verde acceglio marble obtained from the stock supplies of another independent supplier, which was used for the replacement floors.

This finding was not appealed by Vickers.

Neither party raised, on appeal, any issues based upon Federal or Constitutional law and none are articulated in the decisions. The Arizona Supreme Court *reversed* the trial court upon its findings that the original contract was unmodified and also ruled that the issue of unpaid invoices *was not* comprised within any settlement agreement between the parties, essentially reversing on those contentions which facilitate judgment for the unpaid invoices.

REASONS FOR DENIAL OF THE PETITION

I.

The Decision Below Denied No Procedural Due Process and Properly Corrected Errors of Law and Fact in the Trial Court.

This is not, as argued, a case where standards of appellate review under Arizona State law have been obviated, such that a reviewing court failed to give proper deference to the finder of fact at trial, and the affirmance of the trial findings on review. It is a case where the trial court was ultimately determined to have drawn inappropriate conclusions from undisputed fact, and to have failed to apply undisputed law to stipulated fact. The Arizona Supreme Court simply issued an opinion which removed substantial confusion which had resulted from defense trial strategy.

A. In the joint pretrial statement, both counsel agreed that the certain matters were stipulated, all as carried forward into the trial court findings: (Pet. App. E)

14. THE COURT FINDS that between May 12, 1989, and on or about May, 1990, Plaintiff/Counterdefendant FURRER supplied stone products which Defendant/Counterclaimant VICKERS used to complete all exterior and interior marble and granite work at Phase B of the Esplanade Project. The stone materials used on the Esplanade Project include rosa limbara which is light gray granite with pinkish inclusions produced in Sardinia Island; verde acceglio which is dark green marble with light colored veins or inclusions; and alpenina which is a pinkish colored marble from Spain which has some white veins. The only source in the world for verde acceglio marble is in the western Alps in Italy in a quarry owned by Plaintiff/Counterdefendant FURRER. Alpenina is quarried in Portugal. The parties agreed to substitute rose atlantide which is a pinkish marble with white veins quarried in Portugal for the alpenina materials required on the Esplanada Phase B Project.

15. THE COURT FINDS that Plaintiff/Counterdefendant FURRER to Defendant/Counterclaimant VICKERS were identified by nineteen (19) specific invoices, all as attached to FURRER's prior motion for summary judgment filed in this action.

16. THE COURT FINDS that Plaintiff/Counterdefendant FURRER delivered the materials and provided the labor identified in invoice Nos. 1 through 19.

17. THE COURT FINDS that Defendant/Counterclaimant VICKERS ordered the stone materials and labor set forth in Invoice Nos. 1

through 19 dated May 12, 1989, through February 9, 1990, by means of the purchase order, shop drawings, shop tickets and other communications involving VICKERS, R. E. Emery & Associates, and personnel of Plaintiff/Counterdefendant FURRER.

18. THE COURT FINDS that Defendant/Counterclaimant VICKERS has paid Plaintiff/Counterdefendant FURRER the sum of $447,366.06 in nine (9) separate payments as follows:

DATE	CHECK NO.	AMOUNT
6/26/89	3567	$ 31,738.94
7/26/89	3663	$ 28,998.78
8/20/89	3706	$ 25,237.11
9/27/89	3855	$164,827.32
10/18/89	3927	$ 28,357.76
11/27/89	4060	$ 67,223.02
12/27/89	4144	$ 23,103.42
1/29/90	4221	$ 52,894.44
2/9/90	4262	$ 24,985.27

19. THE COURT FINDS that the payments made by Defendant/Counterclaimant discharges all but $2,000.00 for Invoice No. 2193, and Invoice Nos. 123, 165 and 190 remain unpaid.

20. THE COURT FINDS that none of the goods delivered by Plaintiff/Counterdefendant FURRER to Defendant/Counterclaimant VICKERS have been returned to FURRER.

21. THE COURT FINDS that the goods delivered by Plaintiff/Counterdefendant FURRER to Defendant/Counterclaimant VICKERS have in fact been used, consumed or disposed of according to VICKERS' wishes.

The pretrial statement or order supplants the pleadings under Arizona trial procedure and the case is, and was, governed by these agreed matters, Ariz. R. Civ. Pro. 16(e). The trial court had no basis to refuse them.

The above facts and referenced exhibits establish as a matter of law that the original, fixed-price contract negotiated for $461,131.52 in 1989 was very substantially changed during contract administration. The materials and finishing work actually ordered were cut and shipped upon individual orders, submitted by Vickers over time. (Pet. App. C, ¶17) These were, after each shipment was prepared, converted into invoices prepared by Furrer with the billing derived from the self-same unit prices as had been used in submittal of the original bid. (Pet. App. C, ¶16) Vickers acknowledged in trial that the unit prices, which were employed were the standard industry prices and that there was no expectation that they were excessive or not the prices used in the original bid. Some nine invoices, submitted to Vickers with the shipments, were timely and fully paid by Vickers in an amount of $447,366.06. Then, after the marble floor was rejected, payment stopped.

The remaining four invoices, totalling another $105,046.35 were ignored. The 13 invoices taken together and acknowledged by Court and counsel, show that of the original stone as bid, some $154,202.92 was never ordered. However, some $248,491.05 which was *not* in the bid, *was* ordered *and* supplied per the invoices! The extra material ordered (less the stone not ordered) brought the

total to $555,359.79, an increase of $94,220.23[2] but reflecting a change in customer requirements of 54%! These facts were found by the Arizona Supreme Court to be inconsistent with, and insufficient, to support the legal conclusion at trial that the original contract remained, after administration, only a fixed-price contract for $461,131.52.

The law which applies to merchandise ordered, shipped, accepted and used is universally prescribed under Section 2-607 of the Uniform Commercial Code, A.R.S. § 47-2607. "The buyer must pay at the contract rate for any goods accepted."[3] The provisions of ¶16 serve to mandate application of this law. There is no provision of the trial findings in which the court ever specified what the original, fixed-price contract comprised.

B. There is, similarly, no fact basis for urging, as Vickers told the trial court, that all payment obligations were merged into a settlement agreement to share the cost of air freighting one of the final shipments, all four of which were at that time uncompleted, unshipped, and not yet invoiced. The parties had a pending agenda of disputed chargebacks totalling less that $10,000 and Furrer agreed to pay $8,500 of the air freight, which it was not obliged to do, in settlement. No discussion or difference over the invoices, either received or yet to come, was ever mentioned. The Supreme Court properly observed that Furrer could not have waived $107,000 in

---

[2] The total sought in the case is $107,993.73, which includes some ancillary and uncontested costs.

[3] The trial court had allowed that perhaps $2,500 worth of the marble was unconforming to specification but was.

entitlements over less that $10,000 in disputed chargebacks, and certainly not before the last several invoices were even printed. In any event, the claim of "release" or "compromise and settlement" was raised only at trial by Vickers, having been omitted in the answer and in the assertion of a prior motion for summary judgment claiming that the original contract price was paid.

The trial findings again demonstrate inconsistency and confusion on the release issue. The court incipiently finds as follows:

> THE COURT FINDS that Plaintiff/Counterdefendant FURRER and Defendant/Counterclaimant VICKERS agreed that each share one-half of the cost of air shipment of container No. 17, and that such agreement constituted a settlement on the then-known items in dispute.

Then, it goes further to conclude:

> THE COURT FINDS that Plaintiff/Counterdefendant FURRER waived any rights it had to recover $19,893.28 for "extras" [1) Size of stone (a) 4-5 cm rosa limbara = $7,869.94; (b) 2-3 cm verde acceglio = $11,249.53; 2) Brass strips = $299.21; and, 3) floor dots = $474.60.] These extras were acknowledged by Defendant/Counterclaimant VICKERS to be over and above the lump sum fixed price of the purchase order.

The plain truth is that where a settlement agreement is made *prior* to the shipment of over $100,000 in stone wares, and *prior* to their invoice, a settlement agreement cannot embrace these unknown items nor their disproportionate value, and especially where there is absolutely

no mention of the stone and cost overages in the written memoranda of the agreement.

II.

There is no Basis for Review upon Certiorari

The Arizona Supreme Court has decided in this case no question of Constitutional, or of federal law, or even of Arizona state law. The opinion (Pet. App. A) reveals that the Court, accepting jurisdiction and reversing upon a petition for review without additional briefing or argument, acted only in its discretionary and supervisory capacity to correct errors of law and obvious errors of factual discontinuity in the trial court's findings which were not properly traversed in the Court of Appeals. It appears clear that the court below reversed specifically because the trial court findings were, as stated, "clearly erroneous" and plainly reversible under *Board of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 806 P.2d 348 (Ariz. 1991). Vickers has noted that the Court is specifically authorized to reverse "clearly erroneous" findings.

The supervision of trial and appellate court decisions upon state questions of law and fact is vested by Arizona law in the Arizona Supreme Court, Ariz. Const. Art. 6, § 5. There is no Federal authority to authorize or direct this Court to act in aid, or contravention, of the state court's determination of such questions and there is no reason to believe that this Court can make any further contribution to the quality of subordinate state court

function were it to undertake the task of doing so, in this or any similar case.[4]

Vickers contends that the unanimous decision of the Arizona Supreme Court below to revise the trial findings of fact is a denial of due process of law. Unquestionably, whether the Court's conclusion was correct, its task is not *per se* an issue of Constitutional dimension. It has the prerogative of reviewing such findings for error and where error is found, it has the obligation of ruling accordingly. Such an exercise of judicial prerogative, consistent with and within the confines of its jurisdiction, is not a denial of Vicker's rights in and to a decision consistent with due process. It is a necessary act in the protection of Furrer's entitlement to procedural due process! There is no claim that the Supreme court below acted in a manner which deprived its decision of the integrity of everyday judicial administration, *i.e.*, that it is not a properly constituted decision, or that it was arrived upon in some improper fashion. Absent some showing to such effect, Vicker's claims say nothing other than that the Court below decided the case against defendant.

Without the sequestration of a Federal question in the petition as called for under Rule 14(1)(g)(i), of this Court's rules, showing its timely assertion below, and the manner of its disposition, there is no basis upon which this Court can ground its jurisdiction for review and no record on which to assess the possibility that the Arizona

---

[4] Unlike this Court's task relative to the inferior Federal courts.

court acted as claimed, and much less that it acted incorrectly.

Although unprovided, there is likewise nothing in Vickers' Motion for Reconsideration filed after the decision appealed from here to show that the Constitutional issue raised here was first raised below so as to establish the issue for purposes of jurisdiction under 28 U.S.C. § 1257. There is literally nothing in the petition or its appendices as presented to establish that the Arizona court did not act properly. And yet, Rule 14 specifically invites the appending of any necessary portions of the record to so demonstrate. If procedural due process was denied below, the petition and appendix here does not demonstrate, upon any ground, that denial.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM M. PIATT, P.C.

WILLIAM M. PIATT
Attorney for Plaintiff

(3)

Supreme Court, U.S.
FILED
NOV 12 1997
CLERK

No. 97-492

In The

Supreme Court of the United States

October Term, 1997

JOHN F. VICKERS MASONRY, an Arizona corporation,

Petitioner,

vs.

GIUSEPPE FURRER, S.P.A., an Italian corporation,

Respondent.

On Petition for a Writ of Certiorari to the State Supreme Court of Arizona

REPLY BRIEF FOR PETITIONER

CRAIG L. KELLER
Counsel of Record
KELLER & HICKEY
A Professional Corporation
Attorneys for Petitioner
One Windsor Professional Building
2627 North Third Street
Phoenix, Arizona 85004-1188
(602) 266-2110

71938 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

5 pp

STATEMENT OF THE CASE

Petitioner disagrees with the characterization of the case set forth in Respondent's Statement of the Case. Primarily, Respondent has misstated the evidence in arguing that only minor instances of Respondent's nonperformance predated the Settlement Agreement of February 2, 1990. In fact, Respondent's serious production errors lead to material discrepancies which caused Petitioner to incur extra labor requirements and damages in excess of $45,000. Further, and most importantly, Respondent erroneously states that at the time the Settlement Agreement was made by the parties, there was no knowledge of the remaining materials Respondent was to supply to finish the project. The trial evidence proved the Settlement Agreement included Respondent's furnishing all materials required under the contract. Both Petitioner and Respondent knew that each party was waiving its claims against the other just as the trial judge and the Arizona Court of Appeals found. The Arizona Court of Appeals stated:

> Although the parties presented conflicting and confusing testimony regarding their understanding of which issues the agreement resolved, the trial judge is better able than are we to resolve the contradictions. The record provides ample support for the trials court's finding, and we defer to the trial court on this factual question.

(Petition, App. B).

Respondent initiated its suit against Petitioner on the theory of fixed-price contract alleging that Petitioner had not paid pursuant to the contract. Only when Respondent faced dismissal of the claims on summary judgment did Respondent allege open account recovery.

REASONS FOR GRANTING THE WRIT

I.

THE ARIZONA SUPREME COURT'S DECISION DENIED PETITIONER PROCEDURAL DUE PROCESS BECAUSE THE DECISION IGNORED APPLICABLE TRADITIONAL STANDARDS OF REVIEW WHICH REQUIRE DEFERENCE TO THE TRIAL COURT'S FACTUAL DETERMINATIONS ON CONFLICTING EVIDENCE.

Contrary to Respondent's position, this is not simply a case of legal error by the trial court on stipulated fact. The Arizona Supreme Court substituted its judgment for that of the trial judge who made his findings based on conflicting evidence. The Arizona Court of Appeals first reviewed the trial judge's findings and conclusions and properly affirmed the findings and conclusions applying Arizona's appellate standards of review. Then, the Arizona Supreme Court's error, and the denial of Petitioner's procedural due process, occurred when that court totally ignored Arizona's appellate standards of review, weighed the incorrect summary of the evidence presented in Respondent's Petition For Review and then came to its own factual conclusions without even the benefit of oral argument.

A. Respondent Has Distorted The Facts Concerning The Trial Evidence On The Parties' Alleged Agreement To Unit Prices And Bid Prices, Mischaracterizing Material Contract Terms And Respondent's Contract Performance.

Petitioner disagrees with Respondent's statements that unit prices were acknowledged at trial and that unit prices were standard industry prices used in the original bid. The original bid of Respondent contained *no* unit prices. Petitioner had no reason to know what unit prices Respondent used in calculating the bid. Such unit prices were irrelevant to Petitioner who had received a lumpsum bid from Respondent.

The record at trial was teeming with testimony and factual disputes about whether Respondent satisfied the contract requirements to furnish specifically fabricated stone materials. Petitioner did not change the contract requirements by 54%. Miscuts during fabrication were not minor as Respondent alleged, but rather commonplace. Significant quantities of nonconforming materials were supplied untimely by Respondent. Evidence supported the trial judge's finding that Petitioner received materials barely sufficient to complete the contract. (Petition, App. C, Finding #25).

The Arizona Supreme Court — for whatever reason — substituted its findings for those made by the trial court who was better suited to weigh the conflicting evidence. Disregarding the standards of review deprived Petitioner of procedural due process. *Board of Regents v. Phoenix Newspapers,* 167 Ariz. 154, 806 P.2d 348 (Ariz. 1991).

B. The Arizona Supreme Court Disregarded The Standards Of Review And The Parties' Decisions Regarding The Scope Of The Settlement Agreement.

Oddly enough, the Arizona Supreme Court delved into a determination of whether it thought the Settlement Agreement was a good deal for Respondent. In the process, the court disregarded the standards of review which mandate deference to the trial court in findings based on disputed evidence. The court was lead into this determination because Respondent erroneously stated that both parties were unaware of the materials yet to be furnished to complete the project under the lumpsum contract. This determination ignores the Settlement Agreement actually made by Petitioner and Respondent as stone experts. Each party knew from the construction drawings the amount of stone furnished and remaining to be furnished as of February 2, 1990, the date of the Settlement Agreement. Furthermore, Petitioner had already discussed with Respondent the need for additional materials to complete the project and the multitude of Respondent's production errors as of that date.

The Arizona Supreme Court seriously erred in finding that the parities did not consider the materials needed to finish the project when entering into the Settlement Agreement.

Respondent did not waive over $107,000 for materials to be supplied following settlement, as Respondent states. Neither did Petitioner waive only $10,000 in chargebacks. Respondent and the Arizona Supreme Court have ignored all of the offsets for production errors, miscuts, and quantity deficiencies which Petitioner experienced because of Respondent's contract breaches. The evidence was conflicting on the extent of the offsets for production deficiencies which the trial judge evaluated. The trial evidence supported the trial court's findings as affirmed by the Arizona Court of Appeals that these parties understood the status of contract performance and that each was waiving all claims against the other relating to contract completion. Therefore, the Arizona Supreme Court had no legal justification to overturn the decisions of the trial court and the Arizona Court of Appeals both of which followed Arizona law.

II.

THE DENIAL OF PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS BY THE ARIZONA SUPREME COURT PROVIDES A BASIS FOR REVIEW UPON CERTIORARI.

This case involves principles the settlement of which are of vital interest to the public and the parties. If the Arizona Supreme Court is allowed to ignore its traditional standards of review without rehearing, similar litigants will face denial of their procedural due process rights as well. The Arizona Supreme Court is not a court of first impression and should not act as such. This case presents a substantial issue that warrants this Court's attention.

Respondent has properly recognized that the Arizona Supreme Court has the prerogative of reviewing lower court findings for

error. The Arizona Supreme Court is not empowered, however, to pick and chose between the facts presented to effectively rewrite the parties' settlement agreement. The exercise of such authority is not fair and impartial and results in the denial of due process.

Petitioner has timely raised the issues which are the subject of this Petition for Writ of Certiorari. Because the violation of Petitioner's procedural due process rights occurred with the Arizona Supreme Court's decision of February 13, 1996, with that court denying Petitioner's Motion for Reconsideration, the issues could not have been raised any sooner than when raised in this Petition.

CONCLUSION

Limited standards of appellate review recognize that trial judges are in the best position to weigh credibility and resolve factual disputes. Without clearly violating litigants' procedural due process rights, appellate courts cannot substitute their factual determinations for those made at trial upon conflicting evidence. Granting this Petition will allow this Court to preserve procedural due process rights by mandating that appellate courts remain appellate courts. The Petition should be granted.

Respectfully submitted,

CRAIG L. KELLER
Counsel of Record
KELLER & HICKEY
A Professional Corporation
Attorneys for Petitioner
One Windsor Professional Building
2627 North Third Street
Phoenix, Arizona 85004-1188
(602) 266-2110